

2007 SEP 13 A 9:31

The error of law of facts occurred in this court when this court did not hold an evidentiary hearing based on movants claim of ineffective of counsel and facts that files or records does not show, see Machibora, 368 us at 495, so that a factual record bearing precisely on Ms. cooper alleged ineffectives can be created

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see, *United States vs. Griffin*, 699 f2d 1102[8] (11 cir).

The court error of law of fact occurred when this court adopt the magistrate finding based on movant "Actual innocence" claim. The magistrate asserts that Jefferson claims must fail because the record prevents him. id. at dkt. 14. Jefferson disagree because his plea colloquy nor records is sufficient enough to sustain his conviction under 924(c).

In *Jones*, 153 f3d 1307[1-3] (11cir 1998) "defendant pleaded guilty but later challenged his 924(c) conviction alleging actually innocence". see also *Palmer*, 456 F3d 489-490 (5 cir 2006) "where plea colloquy was in sufficient to convict". see also *Montano* 398 F3d 1281 (11cir 2005) "defendant plea was insufficient to convict and defendant claims actually innocent. Therefore Jefferson plea alone is not enough to sustain his conviction under 924(c) with out more see, *Bailey*, 516 U.S. 144, 116 Sct 106-121.

The magistrate cites *Gunn*, 369 f3d 1229, 1234 as a supporting case id at dkt 14. However *Gunn* is distinguishable from Jefferson, *Gunn* is based on firearms in a vehicle based on defendant conspiring to rob a drug courier, and that possession may be actual or constructive, joint or sole id. The government must establish that a defendant had ownership, dominion, or control over the firearm. id. The record is void of evidence that Jefferson had ownership, dominion or control of the firearm. Jefferson admittance of the firearm at his plea colloquy is void because defendant did not know the requirements of 924(c) and what takes to violated them. see *Leonard*, 138 f3d 906 (11ct 1998) "carrying with possession were an improper statement of law-had Congress intended possession alone to trigger liability under 924 (c) it easily could have provided". The magistrate contends that Jefferson case meets the requirement of sufficient nexus between the firearm and the drugs. id. dkt 14. Jefferson disagree, under section 924(c) in order to sustain a conviction there must be a nexus between the firearm and drug selling operation, mere presence, of a firearm around drug proceeds is not enough. see, *Suarez*, 313 f3d 1287, citing *Timmons* id at 1252-1253 both 11cir case, citing, *Finley* (2nd cir) The U.S. attorney testimony that there was no drug

activities going on at the home clearly excludes Jefferson from enhancement under 924(c), see dkt. 5-6id at 19, 22, sentencing.

Jefferson contends that there was "misrepresentation" of the magistrate decision based on that his plea agreement and that the court told him that he was being charged with "with being in possession of a firearm during the commission of a drug trafficking crime". Jefferson disagrees, Jefferson plea colloquy and indictment both states that he knowingly used, carried, and possessed a firearm during a drug trafficking crime. see, exhibit 1&2. The exchange between Jefferson and the court shows nothing other than Jefferson pleading to elements, and that factual basis of evidence nor the plea colloquy showed a connection between the firearm found in the business along with cocaine residue and the firearm found in the home found with cocaine base, all that the government has proven is that drugs and guns were found without more does not sustain a conviction under 924(c), see H. R. Rep. No. 105-344, 1997 WL 668339, at 9 (1997) "The mere presence of a firearm in an area where a criminal act occurs is not sufficient basis for imposing this mandatory sentence, rather the government must illustrate through specific fact, which tie the defendant to the firearm".

The magistrate judge also contends that Jefferson case, firearms were recovered with, or in close proximity to, drugs which he acknowledge trafficking, dkt 14. at 8&9, Jefferson disagrees because had the courts informed him of the elements of 924(C) what's take to convict under the statute then the defendant would have been given true notice of the crime against him. The magistrate judge "misrepresentation" of the defendant's case at hand is abuse, see, dkt 14 at 9, where he contends that the firearm was found on a shelf next to plastic bags, next to a garbage can which contain more plastic bags bearing cocaine residue". Jefferson would like to correct the magistrate's assumption based on the records and evidence that the information is incorrect. see, Jefferson, 302 F.3d 1297, "were the firearm was found under the front desk ^{in this case} in the business and the cocaine residue was found in the trash can in the rear of the business." thus, the facts does not meet the requirement of the Eleventh Circuit.

Jefferson contends that "misrepresentation of fact concerning his superseding indictment that charges him with possession a firearm during in relation to ,and in infurtherance of",Jefferson disagree.Jefferson superseding indictment chargess him with Knowingly used,carried,and possession,.see,exhibit 1&2. The magistrate judge contends that "the phrase "during in relation to"did not refer to criminal conduct charged against jefferson, However by add the the statue in jefferson count along with the possession in futherance created duplicitysee,Pleasant, 125fs2d 177,"the words of the statue are rather straight forward and simple.They proscribe two different kinds of conduct. Again the magistrate contends now that criminal conduct is not charged in the "in furtherancd of"as used in Jefferson superseding indictment.Jefferson disagreeesee dkt.14 at10. What the statue proscribe as conduct in the second clsus is possessing a gun in futherance of(with a particular purpose of advancing) the specified crime.id at Pleasant-182-83. However if there is no criminal conduct charged as describe by the magistrate,then defendant is guilty of violating the elements of 924(c),and the counts for 4&6 are invalid,section 924(C) criminalizes two separate offenses"using or carrying a firearm during and in relation to a drug trafficking crime,and (2)possessing a firearm in futherance of a drug trafficking crime.See Combs,369 F3D930-931[1](6th cir 2004)

Relief requested


Wherefore,the movant respectfully urges this court to grant the instant motion forthwit and under Rule 8(b)(4) to grant movant a evidentary hearing in light of Anderson 11ct(1991)

CERTIFICATE OF SERVICE

This certifies that on this 31st, day of August, 2007, that i played a true and exact copy of the 59(e) motion to "amend or alter judgement, in the US mail with first class postage prepaid in full by handing said document to prison officials here at USP_Atlanta to be mailed to this court and addressed correctly herein to:

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Respectfull submitted


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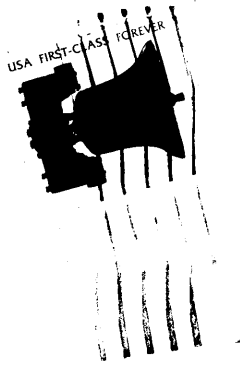
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^uHOston V.lack, 487 US 266(1988)

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